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ABSTRACT

The Yeshiva University court decision is examined, in which the faculty was included with administrators as managers of the university, negating any right of the faculty to unionize. The decision is discussed in light of research on the decision-making process at colleges and universities and the roles of professionals in these institutions. The criteria used by the National Labor Relations Board (NLRB) to assess the status of faculty as supervisors, managers, or professional employees are applied to the activities of faculty members in the academic decision-making process. The refusal of the NLRB to promulgate rules that would clarify faculty employee status is criticized, and suggestions for resolving the uncertainty created by the Board's adjudication process are offered. (Author/MSE)

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# COLLEGE FACULTY AS "MANAGERIAL EMPLOYEES": IMPLICATIONS OF THE YESHIVA UNIVERSITY DECISION FOR FACULTY UNIONIZATION

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# COLLEGE FACULTY AS "MANAGERIAL EMPLOYEES": IMPLICATIONS OF THE YESHIVA UNIVERSITY DECISION FOR FACULTY UNIONIZATION

Barbara A. Lee

The decision of the National Labor Relations Board (NLRB) in 1970 to assume jurisdiction over labor relations in private institutions of higher education initiated nearly a decade of conflict, confrontation, and uncertainty over the role of faculty in the governance of colleges and universities. Despite the upheaval which the 1970 Cornell University decision (183 NLRB 329) engendered in labor relations within higher education, the unionization of faculty at private colleges and universities had proceeded with few significant challenges through the summer of 1978, for faculty at 76 private institutions had formed bargaining units ("Special Report #12" 1978, p. 14). Considerable expertise in the specialized area of contract negotiating in an academic setting had developed, and it appeared that academe was learning to live with, if perhaps not to welcome, formalized bargaining relationships between faculty and administrators at private and public colleges throughout the country.

A decision by a federal Appeals Court, climaxing a four-year fight by a small private university to avoid collective bargaining with its faculty, raised anew many of the issues which had been debated earlier in this decade. Is the role of faculty in the policymaking and governance process of an institution a managerial one, or is it a concomitant of their professional responsibilities? When faculty and administrative decisional roles overlap, who is managing the institution? And because both faculty and administrators are professionals trained in specific academic disciplines, do their overlapping interests as professionals require that their employee interests be considered virtually identical?

This paper examines the Yeshiva University decision in the light of research on the decisionmaking process at colleges and universities and the roles of professionals

in these institutions. The criteria used by the NLRB to assess the status of faculty as supervisors, managers, or professional employees are applied to the activities of faculty members in the academic decisionmaking process. The refusal of the NLRB to promulgate rules which would clarify faculty employee status is criticized, and suggestions for resolving the uncertainty created by the Board's adjudication process are offered.

## The Role of Faculty in the Policy Process

The friction between professional employees and bureaucratic authority structures has been well documented (Scott 1966; Clark 1970). Blau (1964) found that professionals have undergone long training to acquire specialized knowledge or expertise, and that norms developed during this training engender a strong desire for autonomy over their own work and the conduct of their profession. Dornbusch and Scott (1975) documented an especially firm conviction held by college faculty that the only legitimate evaluations of professional capabilities and decisions on the direction of the institution's academic activities were those made by the faculty themselves. Professionals expect, and often assume, considerable authority in the policy process of an organization based not on their hierarchical authority within that organization, but on their specialized knowledge and the deference of their professional colleagues (Scott 1966).

Despite earlier writings which characterized colleges as communities of scholars (Goodman 1962; Millett 1962), it is generally recognized that academic organizations are political systems (Baldridge 1971), subject to the vagaries of fluctuating participation (Milbrath 1965), charismatic leadership, and intra-group conflict (Coser 1956). A recent theory of the policy process at academic institutions has characterized them as "organized anarchies" which suffer from uncertain goals, unclear technology, and fluid participation by organizational members in the decisionmaking process (Cohen and March 1974). Although the concept of "shared authority" between

faculty and administrators describes the academic decisionmaking process on a substantial number of college campuses (Mortimer and McConnell 1978; Keeton 1971), the amount and scope of decisional authority exercised by faculty varies considerably among institutions, and often within them as well.

This diversity and overlap of decisional roles and authority complicates any legal analysis of the degree of "managerial" authority possessed by faculty, acting either as individuals or collectively, for the purpose of determining their legal right to organize and bargain collectively. The line dividing professional influence over institutional decisions from the effective power to make those decisions has yet to be drawn at most institutions, whether or not they are unionized. The Court in the Yeshiva University decision has drawn that line, including faculty with administrators as managers of the University. Should the reasoning used by the Court to draw that line be upheld by the U.S. Supreme Court, it will have significant consequences for the role of faculty in the policy process at all colleges and universities. Faculty may then have to choose between active participation as "managers" who are not permitted to unionize, or token participation in the policy process in order to preserve their right to organize and bargain collectively.

NLRB Attempts to Cope with Collegiality

When Congress passed the National Labor Relations Act (NLRA) in 1935 (29 U.S.C. §151 et seq.), it could not have foreseen that thirty-five years later this Act would be applied to college and university faculty. The language of the Act, including its definition of employees and supervisors, is more appropriate for employees of industrial and commercial bureaucracies than it is for faculty in "loosely-coupled" colleges and universities (Meyer 1975).

But it is this Act that the NLRB must apply when certifying a union and making determinations on the composition of bargaining units. In its hearings and decisions

on faculty unions the Board has had particularly troublesome problems in two areas, the areas which are the focus of the Yeshiva decision: the supervisory status of some (or all) faculty, and the extent to which faculty perform "managerial" duties.

Congress specifically excluded supervisors from coverage by the Act because of the potential conflict of interest between a supervisor's loyalty to management and the concerns of "rank-and-file" workers were the supervisor to be included in an employee bargaining unit. Section 2(11) of the Act defines a supervisor as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action . . . (emphasis added).

In most bureaucratic organizations, few employees possess powers and responsibilities which put them in the supervisory category. However, faculty at numerous colleges and universities participate actively in decisions affecting faculty status, such as hiring, promotion, tenure, nonrenewal, and grievance adjustment, as well as decisions on matters more related to their "academic" roles, such as curriculum or admissions standards. A cursory evaluation of the breadth of faculty governance activities might indeed cause a layperson to categorize faculty as "supervisors."

However, the NLRB has refused to agree that faculty are supervisors. The reason cited most often by the Board is that faculty decisionmaking power is exercised by the faculty as a group; that no individual faculty member has the power to make decisions affecting faculty employment or working conditions /see, e.g., Fordham University, 193 NLRB 134 (1971) and Northeastern University, 218 NLRB 247 (1975)/.

Added to the limitation of decisionmaking power because of its collective nature is the administration's ability to accept or disregard faculty recommendations at will. The Board declared that faculty were not supervisors because final decisionmaking authority is vested in the Board of Trustees, and faculty decisions are reviewable by higher-level administration. More specifically, the Board noted that the

Trustees did not delegate managerial power to the faculty (Adelphi University, p. 648), and that administrators accept faculty recommendations out of deference to the faculty's expertise and professional judgment, but that managerial responsibility remains with the administration (Northeastern University, p. 257).

A second argument used to defeat assertions that faculty are exempt because of their supervisory status is that the Act defines a supervisor as acting "in the interest of the employer." Here the faculty governance role fails to meet the supervisory test, for faculty decisionmaking, whether in personnel matters, curricular or other "academic" matters, or budget recommendations, is exercised in the interest of the faculty. Individuals elected to serve on faculty governance committees are expected to represent the interests of their faculty peers, not the interests of the administration. While many have argued that in a "community of scholars" there is only one interest--that of the academic community--clearly in decisions related to faculty personnel issues and academic or curricular matters, faculty are expected to, and do, exercise their professional judgment in behalf of themselves and their professional colleagues (Finkin 1977, p. 619).

A third argument negating the "faculty as supervisor" concept is that an individual is classified as an employee or a supervisor based on the power which accrues to the individual's position, and not upon a determination of whether or not the individual exercises that power (Kahn 1973, p. 119). In previous labor disputes, this test has eliminated from employee bargaining units those individuals who possessed supervisory power but did not exercise that power. Conversely, faculty who exercise some influence over institutional decisionmaking because of their professional judgment rather than because of their position in the managerial hierarchy should not be classified as supervisors.

While the Yeshiva opinion concludes that faculty may not be supervisors, it argues that they are "managerial employees" and thus exempt from the Act. The Act

does not define a "managerial employee," but decisions by the NLRB and federal courts in cases related to business and industry have developed several criteria to describe a "managerial employee." These employees, although they may not be supervisors, are "so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other" /NLRB v. Bell Aerospace, 416 U.S. 267, 273 (1974), citing an earlier Seventh Circuit case/. For the reasons discussed earlier, it would be unusual to argue that most individual faculty members are more closely aligned with the interests of "management," or the administration, than they are with the interests of their faculty peers.

The Bell Aerospace decision lists a second criterion for a managerial employee, saying that the individual is "formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties" (p. 273). While these activities begin to sound more descriptive of the faculty role in governance, they ascribe more decisionmaking power to a managerial employee than a faculty member possesses. If a collective faculty recommendation is accepted by the administration and becomes institutional policy, it is because the administration chooses to accept that particular recommendation, not because the faculty group is acting in a managerial capacity. And the discretion exercised by a faculty member "in the performance of his duties" results from acknowledgment of professional expertise and administrative deference to the judgment of an individual about what courses he or she will teach and the content of those courses. That deference to faculty judgment is customary professional practice; it is not an allocation of managerial authority.

Ascribing managerial status to an employee assumes that the individual is acting in behalf of management and is accountable to management for the decisions made by that individual (Finkin 1974, p. 618). But faculty are evaluated, both by their peers

and by administrators, on their scholarly ability and productivity, their teaching, and their service to the academic community (Dornbusch and Scott 1975). They are expected to exercise their independent professional judgment as advisors to, but not representatives of, management (Petition for a Writ of Certiorari 1978, p. 22). The impact that an individual faculty member or a group of faculty may have on the formulation of institutional policy is a result of professional influence, not of formal bureaucratic authority (Finkin 1974, p. 615).

The NLRB has maintained that college and university faculty are "professional employees" and are entitled to organize and bargain collectively. An amendment to the National Labor Relations Act in 1970 added this category of employees to the Act's coverage. A "professional employee" is

> (a) any employee engaged in work (i) predominantly intellectual and varied in character . . . (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the results accomplished cannot be standardized . . . (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study . . . /Sec. 2(12)/

The definition also includes an individual who has "completed the courses of specialized intellectual instruction" and who is "performing related work under the supervision of a professional person to qualify himself to become a professional employee." The Board has interpreted this section of the Act as requiring separate professional bargaining units which may include both professional employees and their "junior professional assistants," such as teaching assistants and research assistants (Finkin 1977, p. 810). Even though a faculty member supervises one or more graduate students, the Act's definition of a professional employee permits the faculty member to be included in the professional bargaining unit.

The Board distinguished between professional and managerial employees in its decision on the managerial status of professional engineers in General Dynamics Corp., 213 NLRB 851 (1974). In denying that the engineers were managers, the Board

explained that managerial status ". . . is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management" (p. 857). They went on to explain that the consistent exercise of discretion and judgment was a characteristic of professional competence, and did not grant managerial authority to the professional. Even the potential for influencing the direction of company policy was a component of professional status, and was not enough to confer managerial authority upon a professional employee (pp. 857-858). Also, the exercise of some of the functions included in the statutory definition of a supervisor does not convey managerial status "unless it is exercised in the genuine managerial sense" (p. 858). Characteristically, the Board did not elaborate on what constitutes a "genuine managerial sense."

The inclusion of professional employees within coverage of the Act recognizes that despite the authority to exercise discretion and independent judgment in the performance of his or her professional duties, the professional has employment interests which may differ from those of management. Faculty often insist upon participating in institutional policymaking as much to protect their employee rights as to contribute their professional judgment (Petition p. 25; Lee 1978). Contracts between faculty and management at colleges and universities have incorporated guarantees of faculty participation in governance in order to protect the faculty's employee rights, not to grant them managerial status.[1]

Because of the differences between decisionmaking in a bureaucracy and within a college or university, the NLRB and the courts have admitted some difficulty in applying the statutory definitions and exemptions to academic faculty who actively

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[1]In fact, as the AAUP has pointed out, if participation in governance automatically classified faculty as managers, contracts incorporating governance clauses would immediately destroy the faculty's right to bargain collectively and would invalidate the contract (Brief of AAUP 1978, p. 5).

participate in institutional governance.[2] They have recongnized the dual forms of bureaucratic and professional authority on campus (see, e.g., the Kennedy concurrence to the Northeastern University decision, p. 257). They have vacillated on the inclusion or exclusion of department chairpersons and part-time faculty from the professional bargaining unit (Kahn 1973). However, until the overturning by the Second Circuit Court of Appeals of the Board's decision in the Yeshiva University case, there had been no successful challenges to the Board's insistence that full time faculty were nonmanagerial professional employees who had the right to organize and bargain collectively.

Analysis and Implications of the Yeshiva Decision

The announcement on July 31, 1978 that the Second Circuit Court of Appeals had overruled the NLRB in the Yeshiva University case sent shock waves throughout unionized higher education. The court, classifying faculty as "managerial employees," upheld the administration's refusal to bargain, and exempted the faculty from coverage by the NLRA.

Although the great diversity within higher education precludes comparison of any one institution with the "typical" college or university, Yeshiva University is not unlike many "mature" private universities whose faculty participate actively in institutional governance. Neither the Board nor the Court, however, based any factual or legal findings on similarities or differences between Yeshiva and other unionized institutions, but based their decisions solely on the role of the faculty in the decisionmaking process.

Although a detailed analysis of the governance process at Yeshiva is beyond the

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[2]The Board admitted in its Adelphi decision that "the concept of collegiality . . . does not square with the traditional authority structures with which this Act was designed to cope . . . (p. 648).

scope of this paper, several facts related to governance at that university are worth noting. Yeshiva is a small private university focusing extensively on Jewish cultural and religious studies. It enrolls approximately 1,500 full time students and slightly over 700 part time students. The faculty who were to be included in the bargaining unit[3] numbered 209, and were divided among ten colleges and schools. Thus, the largest academic division had forty-seven faculty divided into several departments. One graduate school had three full time faculty members /NLRB v. Yeshiva University, 582 F.2d 686, 690 (1978)/. Clearly, faculty decision groups for issues of departmental or school/college policy were quite small.

An Executive Council, appointed by the President and consisting of the deans or directors of schools and colleges, plus some directors of administrative divisions, recommends policy and procedure to the President (Petition, p. 4). A budget committee, also appointed by the President and consisting of the Vice President for Business, the Registrar and one dean, formulates budget for each school and for the institution as a whole. This committee also develops financial guidelines for hiring, salary, and promotions, reviews the budgets of individual schools and colleges, and submits them with their recommendation to the President (Petition, p. 5). The Faculty Handbook, which contains policies on faculty personnel matters and describes the faculty role in academic decisionmaking, must be approved by the Executive Council, the President, and the Board of Trustees (Petition, p. 5). The Executive Council sets University-wide policy on required teaching load, salary scale, and tenure, sabbatical, and retirement (Petition, p. 6). The Second Circuit Court did not find it significant that these committees may, and on several occasions have, overruled faculty

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[3]The unit did not include faculty from the College of Medecine, the Graduate School of Medical Sciences, the Yeshiva High School, the Theological Seminary and Cantorial Training Institute, and community service programs. It also excluded part time faculty.

recommendations (582 F.2d at 693).

In addition to the administrative committees described above, considerable decisionmaking power is vested in the Vice President for Business Affairs. He has an "effective veto" over all salary recommendations, promotion and tenure recommendations, tuition increases, and budget decisions (Petition, pp. 8-12). The Vice President testified that he held informal discussions with deans and directors to explain financial or policy limitations before a faculty group submitted its recommendations "so they /the faculty/ don't have to be turned down" (Petition, pp. 8-9). He also testified that faculty recommendations had influenced his decisionmaking in the past (Petition, p. 11). However, the Vice President did not testify that university policy compelled him to accept faculty recommendations as his own. Indeed, his testimony showed that "a continuous process of discussion, informal negotiation, and compromise" exists at Yeshiva (Petition, p. 24), a dynamic process that characterizes governance at a substantial number of colleges and universities, irrespective of their unionized status.

In October 1974, the Yeshiva University Faculty Association petitioned the NLRB for certification of a bargaining unit consisting of all full time faculty at Yeshiva with the exclusions mentioned earlier. The University opposed the petition, contending that its faculty were managerial employees. The NLRB, after twenty-one days of hearings, ruled that the faculty at Yeshiva were non-managerial professional employees and ordered an election /221 NLRB 1053 (1975)/. The union won the election by a "substantial margin" (582 F.2d at 689), but the University refused to bargain with the union. In February of 1977, the NLRB issued a complaint against Yeshiva for refusal to bargain, granted summary judgment against the University, and ordered it to bargain. In October 1977, the NLRB sought enforcement of its order in the Second Circuit Court of Appeals.

The Court, after examining the faculty's role in decisionmaking within each of

the ten schools and colleges whose faculty sought to bargain, concluded that the faculty "acting at times through committees or department chairmen, and at other times as a body, exercise supervisory and managerial functions . . . " (582 F.2d at 696). The Court continued that the full time faculty "without question effectively recommend the hiring, promotion, salary and tenure of the faculty . . . in a manner which can hardly be described as routine or clerical" (p. 696). The Court based these conclusions on the practice of deans and higher administrators of accepting faculty recommendations on faculty personnel matters, curriculum decisions, and academic policies. The Court focused primarily on the practice of the dean or director of each school or college almost always to concur with faculty recommendations. The Court was impressed with the testimony of two deans who felt that they "did not have the right" to overrule faculty decisions on personnel and academic decisions (pp. 692-693). However, this disinclination to overrule faculty decisions stemmed from professional solidarity rather than the dean's lack of authority to overrule faculty, as the opinion shows.

The Court at one point emphasized the faculty's ability to reduce a tuition increase proposed by the dean. It did not give equal weight to the concurrent faculty decision to increase student enrollment (p. 693). Throughout the opinion, the Court focused upon the administration's deference to faculty views, and concluded that the faculty, in making "effective recommendations," was managing the university.

The Court, in labelling faculty "managerial," neglected to analyze the accountability and responsibility of the faculty in its managerial role.

> The crucial consideration is not whether the University administration has chosen to obtain the faculty's views on many important matters, but rather whether, in carrying out its responsibilities, the faculty is functioning for management and therefore is accountable to it for the acceptability of its recommendations.
>
> (Petition, p. 23)

Instead, the Court found that the success of the faculty in persuading management to

accept its recommendations resulted in the actual collective exercise of managerial authority. The Court did not consider the impact of a less collegial president upon the faculty's power to "manage" the institution, nor did the Court cite any formal organizational source of the faculty's authority. Apparently the fact that faculty recommendations were usually followed, based on professional deference on the part of the administration, was sufficient to exclude them as managers in the view of the Court.[4]

The Court then analyzed the four points cited by the NLRB in its finding that Yeshiva faculty were nonmanagerial professional employees. It disputed each of the Board's findings that the faculty are professional employees who act collectively in their own interest, and are subject to the final authority of the Board of Trustees. A brief review of the Court's position on each of these points is useful, for it further explicates the Court's view that informal decisional authority or influence accords managerial status to a professional employee.

The Court agreed that Yeshiva's faculty were professional employees, but stated that professional status does not prevent an individual from being categorized as a supervisor or manager. The Court faulted the NLRB for failing to distinguish between activities which might be managerial within a business organization but are clearly professional on a college campus (582 F.2d at 697, n. 13). The Court found that faculty played a "crucial role" in determining much of the academic policy at Yeshiva, and thus that the faculty were "substantially and pervasively operating the

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[4]The Court did not address the informal negotiating and mutual influence among the vice presidents, deans, and faculty. Few studies of informal power and influence in decisionmaking exist, for the process is elusive and difficult to analyze. However, it could be argued that the administration advises deans of the parameters within which an "acceptable" faculty decision must be reached and the faculty, having operated within those parameters, is able to arrive at a decision already determined to be acceptable to the administration.

enterprise" (p. 698). The Court could not see the close parallels between the professional engineers in the General Dynamics case described earlier /213 NLRB 851 (1974)/ whose advice, based upon their professional expertise, influenced management "on occasion" to make policy changes, and the faculty at Yeshiva, who the Court found to be "largely responsible for the conduct and direction of an institution of higher education" (582 F.2d at 698). The Court did not address the test for supervisory power, described earlier, of organizational delegation of supervision rather than its mere exercise, nor did it explain the role of the University's Executive Council, vice presidents, or President in the decisionmaking process.

The Court then attacked the Board's long-held precedent that the collective, rather than individual, exercise of decisionmaking authority does not confer managerial status (see, e.g., the NLRB's decisions in the Fordham and Northeastern University cases). While the court admitted a "logical difficulty" in holding an individual who does not supervise any other individuals to be a supervisor (582 F.2d at 699), it attacked the Board's previous interpretations of the supervisory provision of the Act as "inconsistent," and asserted that collective supervision was not considered by Congress when it enacted the Act and thus was a "reasonable interpretation" of Section 2(11) (p. 699), despite the explicit definition of a supervisor in that section as an "individual." The Court concluded that neither the Board's criteria nor the Act limits managerial status to the individual exercise of decisionmaking power, and asserted that if a board of directors (clearly managerial) makes group decisions, then faculty group decisions may also be considered managerial.[5]

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[5]Throughout these first two rebuttal points, the Court continually placed the burden upon the NLRB to prove that faculty are not managers and, in the absence of that proof, assumed them to be managerial employees. Without launching into an extensive examination of the burden of proof rules and the value of precedent in agency adjudication, it is still interesting to note that the Court was willing to view professional employees as managers until they were proven otherwise.

The third point which the Court attacked was the NLRB's assertion that Yeshiva faculty act in their own behalf, and not in the administration's interest. The Court disagreed with this assertion solely because the administration "so rarely interfered" with faculty decisions, and concluded that faculty and administrative interests were "co-extensive" (p. 700). Testimony from deans who denied a difference of interest between themselves and the faculty was controlling. The Court neglected to consider the unique academic value system of an institution of higher education in which faculty tend to hold primary allegiance to their profession and their professional colleagues over their institutional allegiance (Clark 1971), and a concomitant value system which tends to denigrate managerial or administrative interests and to esteem academic and faculty interests (Lunsford 1968). Because of the very small size of each school and college within Yeshiva and the probable close working relationship between the deans (many of whom teach at least one course) and the faculty, it is not surprising that the deans would feel that their professional interests coincided with those of the faculty. The Court did not compare the interests of the vice presidents and the President with those of the faculty. The Court (citing Kahn 1973, p. 68) asserted that there was no significant divergence between faculty and administrative goals (582 F.2d at 701), but did not explain why the faculty elected a union "by a substantial margin" to represent its interests (p. 689). The election results are difficult to explain if the interests of faculty and administrators at Yeshiva were identical.

The Court made short work of the Board's contention that, because the faculty was subject to the final authority of the Board of Trustees, it did not have managerial status. Indeed, this point is the Board's weakest argument, for supervisors and managers in business and industrial organizations are also subject to the authority of a board of directors. However, the Court neglected to recognize that faculty are not <u>accountable</u> to the Board of Trustees for their recommendations, as are

supervisors and managers in business and industry. Administrative and trustee recognition of the faculty's professional judgment is responsible for their deference to faculty recommendations in institutional policymaking, an organizational arrangement which is typical of many organizations whose employees are professionals (Finkin 1977, pp. 808-809). But faculty are not dismissed if the Trustees disagree with their recommendations, for the faculty members' role in governance is incidental to their responsibilities to teach, perform research, and serve the academic community.

One final argument by the Board remained, which the Court glossed over. Federal court precedent dictates that administrative agency orders should not be disturbed unless they are "unreasonable" /Kendall College v. NLRB, 570 F.2d 216 (7th Cir. 1978)/. The Supreme Court agrees that a court should "accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration" (416 U.S. at 274, 275). Despite opposing precedent, the Court in the Yeshiva case found that the Board applied "unjustified, arbitrary standards" to the determination of faculty status, and therefore could justify its denial of the Board's order that the University bargain with its faculty. Because of the Court's focus on faculty activities alone, and its neglect of the role of higher-level administrators in the policy process at Yeshiva, it is questionable that the facts of the Yeshiva situation support the Court's refusal to support the Board's interpretation of the NLRA.

The Role of Rulemaking

The NLRB has been sharply criticized for its refusal to conduct rulemaking in regard to the unionization of faculty members (Kahn 1973; Finkin 1974). In 1971 the AAUP filed a petition with the Board requesting that it promulgate rules to define the bargaining unit status of academic employees such as department heads, librarians, and counselors. The Board, fearing that the adoption of rules would require their rigid application in widely varying circumstances, refused, preferring to proceed by

adjudication on a case-by-case basis in the new and uncharted area of higher education unionization (Finkin 1974, pp. 649-650). As a result, its decisions have been inconsistent, and considerable uncertainty and confusion exist nearly a decade after the Board first assumed jurisdiction over private higher education.

The tenor of the Yeshiva opinion is highly critical of the Board for its refusal to use the rulemaking process (582 F.2d at 703). The Court also criticizes the Board for insisting upon adjudication of each case while applying precedent from past decisions to the instant case without a written justification based upon the facts of each case. Another court, in another decision, has also suggested that rulemaking would be helpful to the unit determination process, while admitting that the Board has the discretion to choose its method of decisionmaking /Trustees of Boston University v. NLRB, 575 F.2d 301 (1st Cir. 1978), petition for cert. pending, No. 78-677. Board decisions concerning faculty bargaining units have been called "laconic" with "mechanistic results" (Respondent's Brief, p. 23).

The Board's disinclination to promulgate rules, combined with the overturning of its decision in the Yeshiva University case, has left the field of higher education labor relations in disarray. The lack of guidelines and leadership from the Board, if it continues, will unquestionably lead to further litigation in both the private and public sectors as colleges and universities seek to disenfranchise their faculty unions by using the Yeshiva argument. The Board should work closely with educators and other professionals to develop rules and guidelines so that further resources, already scarce in higher education, need not be spent in duplicative litigation. Otherwise, court decisions such as that of the Yeshiva case, rather than the informed agreements of faculty and administrators, will determine labor practices on college campuses.

Few professionals request that their profession be regulated by any rules save those developed by the profession itself. It would benefit all concerned if the

information collection and public comment requirements of administrative rulemaking were used to address and clarify the issues--legal, economic, and political--that ensnarl the determination of faculty status in academic management.

Conclusion

The relationship between the faculty's status as professionals and their role within a bureaucratic organization has been a source of friction and misunderstanding for decades. The lines of authority within a college or university are tangled in academic value systems, professional allegiances to disciplines rather than to an organization, and the substantial independence enjoyed by faculty members to conduct their professional activities virtually unsupervised. The imposition of a bilateral, highly structured collective bargaining model developed for use by business and industry has exacerbated the friction and misunderstanding already existing between management (administration) and employees (faculty). That this misunderstanding extends beyond the university campus is evidenced by the Yeshiva University decision.

This decision, if affirmed by the U.S. Supreme Court, will have serious consequences for the employee rights of all college and university faculty, for it denies faculty the right to bargain collectively with their employer unless they choose to abdicate their professional responsibility to advise the administration on matters of institutional policy. This forced choice is an unacceptable one that faculty should not be required to make in order to ensure that their interests as employees, as well as their professional interests, are adequately represented.

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